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SCRIBNER CONSULTING GROUP, INC.

July 6, 2005

Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: **Rebuttal Comments on Revised Staff Analysis**
Standardized Testing and Reporting Reconsideration
Grant Joint Union High School District, Interested Party

Dear Paula:

On June 24, 2005, your office issued its revised staff analysis in the *Standardized Testing and Reporting* ("STAR") Reconsideration. The revised analysis recommends that the Commission on State Mandates ("Commission") find that the federal No Child Left Behind Act ("NCLB") is a federal mandate as it relates to the administration of the State's STAR testing program. The basis for staff's recommendation is several documents and facts brought forward by the California Department of Education ("CDE") in its June 9, 2005 comments. The Grant Joint Union High School District ("Grant") disputes the application of several of these documents and files the following comments in rebuttal to the revised staff analysis.

The Evidence in the Record Does Not Support the Conclusion in the Revised Staff Analysis Regarding the *City of Sacramento* Factors.

The revised staff analysis addresses the *City of Sacramento* factors beginning on page 27 of the analysis. Recall that the California Supreme Court held the following in *State of California v. City of Sacramento*:

> [W]e here attempt no final test for "mandatory" versus "optional" compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. Always, the courts and the Commission must respect the governing principle of article XIII B, section 9(b): neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary.[1]

[1] *State of California v. City of Sacramento* (1990) 50 Cal.3d 51, 76.

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Grant has no objections or comments on the application and conclusions reached in the revised staff analysis on the "nature and purpose" or "when state participation began" factors from *City of Sacramento*.[2] However, Grant disagrees with the application and conclusions reached on the remaining factors as detailed below.

"*Intent to Coerce*" Factor

Beginning on page 30, the revised staff analysis discusses the "intent to coerce" factor from the *City of Sacramento* case. Recall that in *City of Sacramento* the California Supreme Court stated this factor as applied to federal law as "whether its *design* suggests an intent to coerce."[3] (Emphasis added.) The revised staff analysis properly cited those portions of federal law that clearly show that the design of NCLB is not intended to coerce states' participation or adherence. However, the conclusion in the revised staff analysis reads:

> "Although NCLB itself does not strongly indicate whether its design suggests an intent to coerce, evidence submitted June 9, 2005 by the CDE (detailed below under 'penalties for withdrawal') indicates that [the United States Department of Education] implements the law in a coercive manner."[4]

Grant contends that the portion of the conclusion regarding implementation of NCLB is irrelevant when determining whether there is an "intent to coerce." As stated in the first part of its conclusion, the revised staff analysis finds that there is no strong evidence that the *design* of NCLB suggests an intent to coerce. The remaining portion of the conclusion is simply commentary by staff and irrelevant to making a finding under this factor. Implementation of NCLB, whether coercive or not, is not relevant when making a determination of whether the *design* of NCLB suggests an intent to coerce as outlined in *City of Sacramento*.

As cited on page 30 of the revised staff analysis, NCLB clearly states that it is not intended to "mandate, direct, or control a State, local educational agency or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction."[5] NCLB also provides that it shall not direct how funds allocated to a state, local educational agency, or school district are to be spent or require the imposition of additional costs.[6]

Clearly, the design of NCLB does not suggest an intent to coerce. As such, the conclusion in the revised staff analysis for the "intent to coerce" factor should be limited to the

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[2] These factors are discussed on pages SA-29 and SA-31 respectively.

[3] *State of California v. City of Sacramento, supra* 50 Cal.3d 51, 76.

[4] Revised Staff Analysis page SA-31.

[5] Title 20 United States Code sections 6575, 7371.

[6] *Id*. at section 7907, subdivision (a).

design of NCLB, not its implementation. Therefore, Grant requests that the revised staff analysis be amended as follows:

> "~~Although~~ NCLB itself does not strongly indicate whether its design suggests an intent to coerce~~, evidence submitted June 9, 2005 by the CDE (detailed below under 'penalties for withdrawal') indicates that [the United States Department of Education] implements the law in a coercive manner~~."

"*Penalties for Withdrawal*" Factor

Beginning on page 32, the revised staff analysis discusses the "penalties for withdrawal" factor from the *City of Sacramento* case. Recall that in *City of Sacramento* the California Supreme Court stated this factor as applied to federal law as "the penalties, if any, assessed for withdrawal or refusal to participate or comply."[7] The revised staff analysis provides an overview of comments filed by CDE on June 9, 2005 and lists the examples cited by CDE as penalties for withdrawal. These examples include the following:

> "[](1) correspondence from the [United States Department of Education ('USDE')] to the Minnesota Department of Education, stating that ten percent (10%) of Minnesota's Title I, Part A administrative funds would be withheld due to Minnesota's failure to use current assessment data for middle and high schools in its computation of Adequate Yearly Progress for those schools, and that USDE would withhold the ten percent for each subsequent year that Minnesota failed to correct this issue; (2) correspondence from the USDE to the Texas Education Agency that four percent (4%) of Texas' Title I, Part A administrative funds would be withheld for Texas' failure to report to schools and districts timely assessment information and adequate yearly progress information; (3) a report and letter from USDE regarding CDE's implementation of various NCLB programs, that included a statement that USDE reserves its option to withhold funds for failure to comply; (4) correspondence from CDE to USDE requesting a waiver for testing English-learner pupil's reading and writing skills in kindergarten and first grade, and USDE's denial of the waiver request."[8]

Grant contends that the first two examples of penalties for withdrawal are irrelevant to the current matter. The penalty applied to Minnesota was based upon the fact that Minnesota failed to use academic assessments in reading/language arts and mathematics as the primary determinants of adequate yearly progress. The United States Department of Education ("USDE") found that Minnesota's failure to do so represented a violation of section 1111(b)(2)(C)(iv) of the Elementary and Secondary Education Act ("ESEA"). Without additional evidence in the record, it is impossible to determine if the situation faced by

[7] *State of California v. City of Sacramento, supra* 50 Cal.3d 51, 76.

[8] Revised Staff Analysis page SA-34.

Minnesota and the penalty assessed would be the same here in California if California chose not to administer the STAR test, but rather some other assessment test. As such, the documentation provided by CDE related to the penalty applied to Minnesota is irrelevant because without more information the revised staff analysis risks comparing apples to oranges.

In addition, the penalty applied to Texas is irrelevant here without more evidence. In this instance, Texas was failing to provide schools and local educational agencies timely assessment information and adequate yearly progress decisions. There is no evidence in the record that such a penalty is relevant to California's administration of the STAR test. Again, it is important when determining whether there is a penalty for withdrawal or noncompliance that any evidence of a penalty applied by the USDE be applicable to present Reconsideration. Clearly, under the fact patterns in both the Minnesota and Texas matters that the penalty applied by the USDE is not related to this Reconsideration. Therefore, these instances should not be considered by staff when making its determination as to whether there is a penalty for withdrawal or noncompliance with NCLB.

It is unclear where in the record the revised staff analysis finds support for example (3) above. Grant requests that the revised staff analysis provide appropriate citations to the record to support this contention. Regardless, Grant finds the report cited in example (3) above irrelevant when determining if a penalty for withdrawal or noncompliance will be applied by the USDE. As stated in the report cited in example (3) above, California was given 30 days to respond to the report, which appears to be received on December 10, 2004. Therefore, CDE should have provided a response to the USDE by early January 2005. This response is not contained in the record.

The importance of this report and CDE's response is simple. When discussing whether there is a penalty for withdrawal or noncompliance with NCLB the focus is on some tangible, real penalty. Chief Legal Counsel to the Commission, Mr. Paul Starkey, stated this point at the Commission's May 26, 2005 hearing:

> "[I]s there a certainty in the law. Not a perception, not a belief, not an apprehension; but does the law impose a certainty for penalties? [] But, in fact, we're not focusing on, again, the perceptions or the 'what ifs.' *We're looking for clear direction that the federal government has some – has done something to make this a certainty*."[9] (Emphasis added.)

The December 10, 2004 USDE report included *twenty seven (27)* findings where California did not comply with NCLB and made recommendations to become compliant. CDE then had 30 days to provide some evidence as to how and when the state will meet the NCLB provisions outlined in the report. The fact is, the state was out of compliance, and no penalty was applied. In fact, the state was *way* out of compliance on twenty seven (27) items and still

[9] Commission on State Mandates May 26, 2005 Hearing Transcript, page 48, lines 21-23 and page 49, lines 4-8.

the USDE did not do something to make the imposition of a penalty a certainty. The opposite occurred. The USDE has given the state ample opportunity to become compliant and has yet to threaten a specific sanction or penalty for the state's non-compliance with NCLB's provisions. Therefore, even with a specific citation to a section of the December 10, 2004 report that a penalty *may be applied* by the USDE if the state does not meet the NCLB standards, the facts do not support that such a penalty will be applied or is certain and severe.

The fourth example on page 34 discusses the waiver sought by the state and the USDE's refusal to grant such a waiver. Grant fails to understand how this relates to the "penalty for withdrawal" analysis or how this adds any support for the position that NCLB is a federal mandate. To the contrary, the fact that the NCLB provides a waiver process belies the conclusion that there are certain and severe penalties that will be applied for noncompliance with NCLB. How can the revised staff analysis find that there are certain and severe penalties in the face of a waiver process? As stated by Mr. Starkey at the Commission's May 26, 2005 hearing:

> "[I]f in fact, the federal government has imposed or is threatening to impose a sanction, I would expect that there would be a letter that sites a regulation or a statute that gives them the authority to do that; or there would be something that you would be able to point to say, *this is a tangible, real threat, as opposed to it may or may not happen*."[10] (Emphasis added.)

The combination of example (3), where the state is way out of compliance and given opportunity to cure, and example (4), where the state may seek a waiver of any portion of NCLB, provides support for the conclusion that any penalty that may be available in federal law is rarely applied. It seems to Grant that California is given numerous opportunities to become compliant or seek a waiver of a specific section of NCLB before any proposed penalty may be applied. This is far from certain and severe. Moreover, it does not appear that there is any real or tangible threat when faced with the facts. Under the facts outlined in the revised staff analysis, any penalty available to the USDE may or may not be applied. Simply having a penalty available does not make the imposition of said penalty "certain and severe."

Based upon the foregoing, Grant requests the paragraph on page 34 of the revised staff analysis citing the four examples provided by CDE be removed. If staff is unwilling to strike this paragraph from the revised staff analysis, Grant requests clarification whether staff, when making its determination in the "penalty for withdrawal" section of the analysis, relies upon any or all of the examples provided by CDE. As currently drafted, it is unclear whether staff finds these examples relevant or applicable.

On page 34 of the revised staff analysis is reference to a January 15, 2005 letter from the USDE to all Chief State School Officers. The analysis states that this letter represents "CDE's most persuasive evidence" that NCLB imposes certain and severe penalties for withdrawal or

[10] *Id*. at page 52, lines 20-25, page 53 lines 1-2.

noncompliance.[11] The revised staff analysis cites to the January 15, 2005 USDE letter as follows:

> "[I]f the state's system of standards and assessment is not approved, USDE can choose from any one or more of three remedies: withholding state funds pursuant to section 1111 (g)(2) of NCLB, a compliance agreement, and/or mandatory oversight status. In the same letter, USDE also states, 'Further, if a State's standards and assessment system does not have *Full Approval* or *Full Approval with Recommendations* by July 1, 2006, we will place conditions on the receipt of fiscal year 2006 Title I funding. These condition [sic] will continue until *Full Approval* or *Full Approval with Recommendation* is attained.'"[12] (Emphasis in original.)

The revised staff analysis then states that the penalty for not assessing pupils is "USDE withholding funds for 'state administration.' (Citation omitted.) Based on CDE's June 20, 2005 declaration, this would amount to $109 million that California receives for state administration."[13]

Grant disagrees with the leap of logic that occurs at this point in the revised staff analysis. Immediately following a discussion of *numerous* options or penalties that the USDE has at its disposal for withdrawal or noncompliance, the revised staff analysis clings to only *one of three penalties* – the fiscal penalty discussed in the January 15, 2005 USDE letter. Why is it certain that the USDE will choose the financial penalty over the non-financial penalties? As stated in the USDE letter, the USDE may choose *any one or more of three remedies*. What evidence is in the record that supports the fact that the revised staff analysis assumes that one penalty would be assessed over the others? In fact, there is none in the record as California has yet to experience such penalties.

Moreover, as previously discussed, California is *currently not in compliance with the NCLB* and has not been threatened with any sort of penalty from the USDE – financial or otherwise. Grant finds that the assumption that a fiscal penalty would be applied over a non-fiscal penalty is unsupported in the record and amounts to a perception, a belief, or an apprehension. All of the things the Commission's Chief Counsel stated at its May 26, 2005 hearing *would not support* a finding of a certain and severe penalty.[14]

The revised staff analysis concludes that the documents submitted by CDE "demonstrate substantial evidence that the penalties for not implementing NCLB-required assessments in

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[11] Revised Staff Analysis page SA-34.

[12] *Ibid.*

[13] *Id*. at SA-35.

[14] *See* Commission on State Mandates May 26, 2005 Hearing Transcript; *See also* page 4 of this Rebuttal.

California would be certain and severe."[15] The revised staff analysis lists the following as support of its conclusion:

> "(1) statutory authority for USDE to withhold "funds for State administration under this part [Part A of Subchapter I of NCLB]" or $109 million; (2) the January 2005 USDE letter stating that USDE may put conditions on Title I funds if its assessment system is not approved, and evidence that Title I funding is $3 billion for California, or (according to CDE) 7.6 percent of the state's education budget; (3) the fact that USDE has already withheld 10% of Minnesota's state administration funds for failure to use current assessment data for middle and high schools in its computation of Adequate Yearly Progress for those schools, and that USDE would withhold the ten percent for each subsequent year that Minnesota failed to correct this issue; (4) testimony and a declaration from CDE that NCLB constitutes an environment of compulsion and coercion; (5) Other documents and testimony from CDE, DOF and LAO that supports the finding that NCLB is coercive on the state."[16]

Grant submits that none of the five items listed above support a finding that NCLB includes a *certain and severe* penalty for withdrawal or noncompliance.

As to the statutory authority to withhold funds for state administration, there is no evidence in the record that this penalty is certain and severe. As discussed above, the USDE has numerous penalties at its disposal and there is no evidence that if California fails to comply with NCLB that one penalty would be applied over another. Moreover, since California is currently not in compliance with NCLB and no penalty has been threatened or applied it is clear that the penalties listed in the USDE letter are not in fact certain.

In addition, it is Grant's contention that the loss of state administration funds do not rise to the level of "severe." Based on CDE's June 20, 2005 declaration, funds for state administration amount to $109 million. The revised staff analysis provides that California receives $3.012 billion in Title 1 funds.[17] Assuming these figures are correct, this means that California would stand to lose only 3.6% of the federal funds received for Title 1. Assuming the USDE applies a financial penalty over the other two non-financial penalties for California's non-compliance with NCLB (which is currently the case with no penalty), California would still receive 96.4% of its Title 1 funding, or *$2,903,000,000*. A loss of only 3.6% of federal funds when placed in context of the total amount received by California, *$3,012,000,000*, is certainly not severe.

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[15] Revised Staff Analysis page SA-35.

[16] *Ibid*.

[17] *Id*. at SA-33.

The second element the revised staff analysis uses to support the conclusion that the NCLB imposes certain and severe penalties for withdrawal or noncompliance is irrelevant. There is no evidence in the record that the placement of conditions upon the receipt of federal funds for NCLB would be certain and severe. Again, in the face of California's current non-compliance with NCLB no penalties have been assessed by the USDE. The plain language of the USDE letter states that it *may* put conditions on Title 1 funds. This is far from certain.[18] Further, there is no evidence that these "conditions" would be severe, as the letter fails to identify these conditions. Without evidence in the record as to what these conditions amount to there is no legal basis for the conclusion that they are certain and severe. The second element cited in the revised staff analysis to support the conclusion that the NCLB includes a certain and severe penalty for withdrawal or noncompliance simply amounts to a "perception, a belief, or an apprehension."

The third element the revised staff analysis uses to support the conclusion that the NCLB imposes certain and severe penalties for withdrawal or noncompliance is irrelevant. What evidence exists in the record that the facts underlying the penalty applied to Minnesota are applicable here? There is none. Grant disputes this element on the basis that the revised staff analysis could be comparing apples to oranges. Moreover, how is this penalty severe? Assuming the USDE applies the same penalty to California for its current non-compliance with NCLB, the amount is far from severe.

Recall that the USDE withheld 10% of Minnesota's state administration funds. As stated in the revised staff analysis, California receives $109 million in state administration funds. Ten percent of $109 million is only $10.9 million. Therefore, this penalty would amount to a loss of only 0.004% of the total Title 1 funds California receives.[19] Grant hardly finds this to be severe and as such element three fails to support the conclusion that the NCLB imposes a certain and severe penalty for withdrawal or noncompliance.[20]

The fourth element the revised staff analysis uses to support the conclusion that the NCLB imposes certain and severe penalties for withdrawal or noncompliance is irrelevant. How can the testimony and declaration of one person be used to support the contention that there is an environment of compulsion and coercion surrounding the NCLB? Ignoring the clear "he said/she said" problem with accepting such evidence as support on such a crucial issue, the testimony and support does not go to the ultimate issue – whether there is a penalty for withdrawal or noncompliance. As stated in the revised staff analysis, the testimony and

[18] Especially in the mandate arena where only those laws that include language such as "shall" will be considered mandatory. A letter that provides the word "may" by itself is enough for the Commission to conclude that this is clearly not a certain and severe penalty, but rather one that could be applied.

[19] We need not even consider whether this penalty is severe if California faced Texas' penalty – 4% of its state administration funds.

[20] Even assuming that this penalty is certain, which the evidence in the record clearly indicates that it is not.

declaration are used to evidence "*an environment of compulsion and coercion*."[21] (Emphasis added.)

Grant fails to understand how such evidence is supportive of the issue discussed at this point in the revised staff analysis. At this point in the revised staff analysis, we are not concerned with whether there is an intent to coerce, that issue was discussed previously in the revised staff analysis. If the revised staff analysis is attempting to provide support for a conclusion that the NCLB is designed to coerce in the face of clear federal law that says otherwise, then element four must be moved to that section of the revised staff analysis. Grant finds element four to be irrelevant when attempting to determine whether the NCLB includes a certain and severe penalty for withdrawal or noncompliance.

The fifth element the revised staff analysis uses to support the conclusion that the NCLB imposes certain and severe penalties for withdrawal or noncompliance is irrelevant. If there is "other documents and testimony" that supports the conclusion that there exists a certain and severe penalty for withdrawal or noncompliance, then what is it? There is no citation to this mysterious additional documentation and testimony in the revised staff analysis. Inclusion of this type of statement in the revised staff analysis is akin to simply saying there is a certain and severe penalty "because there is." If element five is to remain in the revised staff analysis, Grant requests that clear citations to the "other documents and testimony" be included so that it can potentially rebut such information. As currently drafted, Grant has no ability to rebut the "other documents and testimony" that the revised staff analysis says supports its conclusion that the NCLB includes a certain and severe penalty for withdrawal or noncompliance.

Based on the foregoing, Grant finds that the record fails to support the conclusion in the revised staff analysis that the NCLB includes a certain and severe penalty for withdrawal or noncompliance. Therefore, Grant respectfully requests that the revised staff analysis be amended to conclude as such.

"*Other Consequences*" Factor

It is unclear to Grant whether the revised staff analysis finds there are or are not other consequences that would be applicable here. It appears that the analysis is stating that there are not and therefore, this factor is not relevant. If this is the case, Grant requests that the revised staff analysis include an affirmative statement as to whether there are or are not other consequences applicable here.

<u>The *Hayes* Analysis in the Revised Staff Analysis is Incomplete</u>.

The revised staff analysis begins the *Hayes* analysis on page 35. Recall, the focus of the *Hayes* analysis is whether a federal mandate imposed upon the state was in turn freely imposed

[21] Revised Staff Analysis page SA-35.

upon local government by the state.[22] The focus then is on whether the state has "no true choice" in whether to impose the federally mandated activities upon local government or school districts. Grant contends that, when the previous discussion regarding certain and severe penalties is considered, the state has a true choice concerning the imposition of the STAR testing program on school districts.

Grant finds that the NCLB does not impose a certain and severe penalty and as such, the state is freely imposing the STAR testing program upon school districts. However, even assuming the analysis in the revised staff analysis is correct, the penalty imposed upon the state – the loss of 10% of state administration funds or $10.9 million out of over $3 billion in federal Title 1 funds – is not severe enough to mean the state has "no true choice" regarding the imposition of NCLB requirements upon school districts.

In comparison to the "barrage of litigation" that the state in *Hayes* would face for failure to implement the federal statute, the same cannot be said here. While the state faces the loss of Title 1 funds, this in itself does not mean there is no true choice regarding the implementation of the STAR program. Furthermore, there is no evidence in the record that all Title 1 funding the state receives would be in jeopardy if the state was not in compliance with NCLB's provisions.[23]

On pages 36 and 37 of the revised staff analysis, there is a discussion of the CAT/6 exam and the application of the *Hayes* case to the CAT/6 exam. However, there is no statement in the revised staff analysis related to the rest of the STAR test and whether the state has a true choice in complying with the NCLB. As such, the revised staff analysis is deficient in its application of the *Hayes* case to this reconsideration. Grant requests that the revised staff analysis include the proper analysis of the *Hayes* case to the entire STAR testing program and that state agencies and interested parties then be given additional time to rebut any findings and conclusions added by staff.

[22] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593.

[23] Again, California is out of compliance and still continues to receive Title 1 funds.

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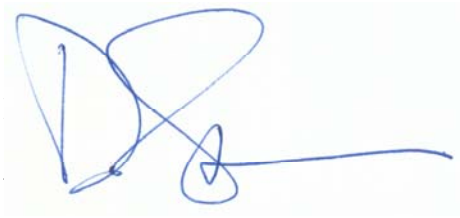
Based on the foregoing, Grant requests that the revised staff analysis be amended consistent with these comments to conclude NCLB is not a federal mandate under the *City of Sacramento* factors and is not a federal mandate under the *Hayes* analysis. Grant does not provide comments or analysis on the remaining portions of the revised staff analysis. If you have any questions regarding these comments, please contact me at (916) 922-2636.

Sincerely,
SCRIBNER CONSULTING GROUP, INC.



David E. Scribner, Esq.
President/CEO

Enc: Authorization to Act as Representative

Cc: Mr. Bruce Mangerich, Deputy Superintendent
Mr. Rob Roach, Mandated Cost Analyst

AUTHORIZATION TO ACT AS REPRESENTATIVE
FOR GRANT JOINT UNION HIGH SCHOOL DISTRICT

STANDARDIZED TESTING AND REPORTING (STAR)
RECONSIDERATION

I, Bruce Mangerich, hereby authorize David E. Scribner (or designee) of the Scribner Consulting Group, Inc. to act as the representative and sole contact of Grant Joint Union High School District in this Reconsideration. All correspondence and communications regarding this Reconsideration should be forwarded to:

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Dated: 6/28/05

Bruce Mangerich
Deputy Superintendent